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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-803

WILLIAM G. BARRY, as Chairman of the New York State Racing and Wagering Board, *et al.*,

Appellants,

—against—

JOHN BARCHI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* OF JOCKEYS' GUILD, INC.

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MOTION OF JOCKEYS' GUILD, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Jockeys' Guild, Inc. hereby respectfully moves, pursuant to Rule 42(3) of the Rules of the Supreme Court, for leave to file the accompanying brief, as *amicus curiae,* in support of the decision below of the Three-Judge District Court for the Southern District of New York, which is reported *sub nom. Barchi* v. *Sarafan* at 436 F. Supp. 775, and in support of the position of the Appellee. Counsel for the Appellee has consented to the filing of this brief. Counsel for the Appellants has not consented, but has stated that he will not oppose this motion.

Interest of *Amicus Curiae*

The racing industry is divided into two parts, thoroughbred racing and harness racing. In New York, the State Racing and Wagering Board, the members of which are the principal Appellants in this case, supervises both.

In the thoroughbred racing industry, the horse owners generally engage free-lance jockeys, through the jockeys' agents, to ride in each particular race. These jockeys are licensed by the Racing Board of the state where the race is to be conducted.[1]

Jockeys' Guild, Inc. (the "Guild") is a New York not-for-profit corporation providing for the welfare of jockeys in the thoroughbred racing industry. It furnishes (i) representation and, through appropriate insurance carriers, life insurance, health insurance and disability benefits for active jockeys and (ii) direct financial aid for permanently disabled jockeys. The Guild has approximately 1,553 active members. These constitute the vast majority of the active jockeys in the United States.

The Guild respectfully moves to submit this brief because it believes that the decision below holding Section 8022 of the New York Unconsolidated Laws (McKinney 1961 & Supp. 1977-78) unconstitutional was correct. It believes that Section 8022, in providing for the summary punishment of an occupational licensee pending a hearing, is patently inconsistent with the protective standards required by this Court in order to satisfy the requirements of due process in administrative proceedings.

[1] These jockeys are regarded as independent contractors for virtually all purposes, including federal tax purposes. In approximately 5 states, however, a jockey is treated as the employee of the owner of the particular horse he rides for Workmen's Compensation purposes. New York is one of these few states.

The Appellants would ask this Court to weigh the interests of the State of New York on the one hand and all of its licensees in the harness racing industry on the other hand and to determine conclusively, as a matter of substantive law, that the interests of the State always emerge as paramount. They ask this Court to carve out an exception for the harness racing industry which would sanction pre-hearing discipline, regardless of the nature of the charges.

The fact that the Appellants are responsible for regulating the thoroughbred racing industry in addition to the harness racing industry and their heavy reliance on cases in the former industry, convinces the Guild that they seek to establish a precedent in the case at bar which would be applicable, not only to licensees in the harness racing industry, but also to licensees in the thoroughbred racing industry (which would include jockeys). Unlike the parties to the case, who are only concerned with the application of Section 8022 in the State of New York, the Guild and its members would be affected by such a precedent nationally.

The Guild has reason to believe that, when the parties argue the question of whether or not the summary disciplinary procedure in Section 8022 is constitutional, they will do so only in the context of the facts of the case at bar, which involved the type of situation in which the public might have been defrauded or lost confidence. The Guild wishes to apprise the Court of the fact that disciplinary charges may be levied against a licensee for violating any one of a number of "Rules of Racing" and that some of these situations do not involve possible fraud, loss of

public confidence, or even the mere appearance of impropriety. In particular, the Guild is concerned with those situations in which the licensee believes in good faith that it is unsafe to ride.[2]

The Guild further believes that, because the types of situations which may arise in the racing industry vary so widely, room must be left to weigh the private interests of the licensees against the public interests which are affected in the same situations and, where appropriate, to tailor procedural protections to fit them. Section 8022 leaves no such room and thus fails to satisfy the requirements of due process.

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[2] In addition to the Guild's primary interest in the welfare of jockeys generally, the Guild has a direct and substantial financial interest in track safety. It provides, each year, about $73,000 in direct financial aid to approximately 25 paraplegics and about $229,000 in direct financial aid to members injured at tracks. In addition, Illinois Hospital & Health Services, Inc., the health insurance carrier for the Guild members, has advised the Guild that it paid out $63,507 during the last policy year in claims by jockeys who incurred medical expenses as a result of on-track injuries in excess of the reimbursable limits under the policy of accident insurance which most racing associations in the country carry, as a group, with Lloyds of London. The Guild has urged these racing associations, through Thoroughbred Racing Association of North America, Inc., their trade association, to increase these limits. However, recent quotations by Lloyds have indicated that, if every racing association were required to carry an amount of insurance which the Guild considers adequate, several would probably have to close their race courses or go bankrupt, to the further detriment of the Guild's members. These figures are not surprising when it is understood that the expenses of a single on-track injury can easily exceed $100,000 over the years.

Accordingly, the Guild respectfully requests leave to file the annexed brief *amicus curiae.*

Respectfully submitted,

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TABLE OF CONTENTS

PAGE

Question Presented 2

Interest of *Amicus Curiae* 3

Summary of Argument 5

ARGUMENT

I. Section 8022, in providing a summary disciplinary procedure, precludes balancing the correct private and public interests in specific situations and accordingly fails to satisfy due process 6

a. The appropriate test for evaluating whether the safeguards of a procedure meet the requirements of due process in any given situation mandates that the *specific* and *particular* private interest of the licensee which will be affected by the official action must be weighed against those governmental interests which can reasonably be expected to be affected in that same situation 7

b. The private interests which may be affected by official action in the racing industry include a wide variety of interests, such as that of the licensee's physical safety 10

c. The public interests of preventing fraud, insuring public confidence and maintaining tax revenues are not always *affected* in these situations 12

PAGE

II. Section 8022, in providing a summary disciplinary procedure, preempts analysis of the risks of an erroneous determination and, when appropriate, development of substitute procedural safeguards, and accordingly offends due process 16

a. The case before this Court is an example of the high risk of an erroneous determination 17

b. Substitute procedural safeguards are clearly necessary in some situations 17

c. Stays have not in fact been granted, except possibly in very rare instances, and hearings have not in fact been held promptly 19

CONCLUSION 20

CITATIONS

Cases:

Basel v. Knebel, 551 F.2d 395 (D.C. Cir. 1977) 9

Dixon v. Love, 431 U.S. 105 (1977) 9

Drummon v. Fulton County Dept. of Family & Children's Services, 563 F.2d 1200 (5th Cir. 1977) 9

Halpern v. Lomenzo, 81 Misc.2d 467, 367 N.Y.S.2d 653 (Sup. Ct., N.Y. Co. 1975) 3, 4

Hubel v. West Virginia Racing Commission, 513 F.2d 240 (4th Cir. 1975) ..... *passim*

Ingraham v. Wright, 430 U.S. 651 (1977) 9

PAGE

Kennedy v. Robb, 547 F.2d 408 (8th Cir. 1976), *cert. denied*, 431 U.S. 959 (1977) 9

Lee v. Thornton, 538 F.2d 27 (2d Cir. 1976) 9

Mathews v. Eldridge, 424 U.S. 319 (1976) ..... *passim*

Mathews v. Mattern, 425 U.S. 987 (1976), *vacating* 519 F.2d 150 (3d Cir. 1975) 9

Mathews v. Williams, 424 U.S. 951 (1976), *vacating* Williams v. Weinberger, 494 F.2d 1191 (5th Cir. 1974) 9

McGrath v. Weinberger, 541 F.2d 249 (10th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977) 9

Montrym v. Panora, 438 F. Supp. 1157 (D. Mass. 1977) 9

Morrissey v. Brewer, 408 U.S. 471 (1972) 5, 7

Ong v. Tovey, 552 F.2d 305 (9th Cir. 1977) 9

Ruane v. New York State Racing and Wagering Board, 532 F.2d 860 (2d Cir. 1976) ..... *passim*

Tappis v. New York State Racing and Wagering Board, 36 N.Y.2d 862, 331 N.E.2d 697, 370 N.Y.S.2d 922 (1975) 14

Wilkerson et al. v. Waterford Park, Inc. et al. [N.O.R.] (W. Va., May 26, 1969), *cert. denied*, 396 U.S. 906 (1969) 4

Williams v. Weinberger, 494 F.2d 1191 (5th Cir. 1974) 9

Zurak v. Ryan, 550 F.2d 86 (2d Cir. 1977), *cert. denied*, 433 U.S. 914 (1978) 9

PAGE

Statutes and Regulations:

Commonwealth of Kentucky, Regulations, 810 KAR 1:001 *et seq.*, Reg. IX, §9 4

State of New York, Administrative Procedure Act, §§301, 401 (McKinney Consol. L. 1977) 16, 17

State of New York, Unconsolidated Laws, §8022 (McKinney 1961 & Supp. 1977-78) .....*passim*

State of New York, Official Compilation of Codes, Rules and Regulations, 19 NYCRR §22.12 4

State of New York, Official Compilation of Codes, Rules and Regulations, 19 NYCRR §40.6 4

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BRIEF FOR JOCKEYS' GUILD, INC. AS *AMICUS CURIAE*

Jockeys' Guild, Inc., as *amicus curiae,* respectfully submits this brief on the merits, pursuant to Rule 42 of this Court, in support of the decision below of the Three-Judge District Court for the Southern District of New York, which is reported *sub nom. Barchi* v. *Sarafan,* at 436 F. Supp. 775, and in support of the position of the Appellee.

Question Presented

The Appellants presented the following question to this Court in their Jurisdictional Statement:

> "1. Does a statute providing for summary suspension of the occupational license of a racing industry participant, pending hearing and determination of disciplinary changes [*sic*], deny licensees due process or equal protection of the laws?"

In their Brief, however, they narrowed the question to read as follows:

> "Does a statute providing for summary suspension of the occupational license of a *harness* racing industry participant prior to any hearing and determination of disciplinary charges deny such licensee due process or equal protection of the laws?" [Emphasis added]

Notwithstanding this narrower question, the Guild is convinced that the Appellants seek to have this Court establish a precedent in this case which would be applicable to *all* participants in the *entire* racing industry. This conclusion is supported by the failure of the Appellants to distinguish between harness racing and thoroughbred racing in the subsequent pages of their Brief, by their heavy reliance on cases involving the thoroughbred racing industry, by the fact that the Appellants are as much concerned with regulating the thoroughbred racing industry as the harness racing industry in the State of New York, and by the brief

amicus curiae of The New York Racing Association Inc., which only operates thoroughbred race courses.[1]

Interest of *Amicus Curiae*

As the Guild has stated in its motion for leave to submit this brief, it wishes to adequately apprise the Court of the fact that disciplinary charges may be levied against a licensee for violating any one of a number of the "Rules of Racing" and that some of these situations do not involve possible fraud, loss of public confidence or the mere appearance of impropriety. In particular, the Guild is concerned with those situations in which the licensee believes, rightly or wrongly, that it is unsafe to ride and is punished for not riding in a summary disciplinary proceeding.

In the thoroughbred racing industry, for example, there are at least four situations beyond the control of a jockey which pose a threat to his safety—an unsafe race course (e.g., a frozen track), hazardous weather conditions (e.g., lightning, blinding sleet), an unsound horse and the physical illness of the jockey himself.[2] We submit that, in any

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[1] The New York Racing Association Inc. has been held to be in symbiotic financial relationship with the State of New York. *Halpern* v. *Lomenzo*, 81 Misc.2d 467, 473, 367 N.Y.S.2d 653, 660 (Sup. Ct., N.Y. Co. 1975).

[2] This underlying issue of track safety is what prompted the Guild to encourage three of its members to address this Court before. In a Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia (at p. 4), they asked this Court to determine whether West Virginia had deprived them of their rights under the Fourteenth Amendment of the United States Constitution by permitting them to be excluded from a race track in West Virginia without any hearing or specified reason. They asserted that they had in fact been banned from the track because "they had objected to racing on frozen and unsafe tracks and had resisted attempts to turn Guild members into 'company' men—

one of these situations, a jockey may be justified in refusing to fulfill his riding engagement.[3] Yet, in virtually every state where thoroughbred racing is conducted, the Rules of Racing provide that a jockey may be punished for failing to do so.[4] On its face, the rule authorizes such punishment without regard to the jockey's reason.[5] The punishment may include suspension.[6]

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that is, to bring them so completely under the control of track management that they could not exercise independent judgment and honestly fulfill their obligations to their employers and the public." *Wilkerson et al.* v. *Waterford Park, Inc. et al.* [N.O.R.], (W. Va., May 26, 1969), *cert. denied,* 396 U.S. 906 (1969).

[3] The Guild respectfully submits that a jockey, merely by accepting a riding engagement, does not assume unusual risks. A track accident may result in his permanent injury, paralysis or even death, and we submit that he should not be compelled, by threat of punishment, to expose himself to these unusual dangers.

[4] These rules are substantially the same in all of the states where thoroughbred racing is conducted. In New York, Rule 40.6 provides: "If a jockey engaged for a race or for a specified time refuses to fulfill his engagement, he may be punished as provided by sections 22.12 through 22.15, *supra.*" 19 NYCRR §40.6.

[5] The Guild recently prevailed upon the Kentucky State Racing Commission to amend the rule in that State to provide as follows: "No rider shall be forced to ride a horse he believes to be unsound, nor over a racing strip he believes to be unsafe, but if the stewards find a rider's refusal to fulfill a riding engagement is based on a personal belief unwarranted by the facts and circumstances, such rider may be subject to disciplinary action." 810 KAR 1:009, §9.

[6] In New York, Rule 22.12 grants the race stewards the right to suspend trainers, jockeys and others licensed by the State Racing Commission from "acting or riding" for as much as 60 days. 19 NYCRR §22.12. In *Halpern* v. *Lomenzo,* 81 Misc. 467, 367 N.Y.S. 2d 653 (Sup. Ct., N.Y. Co. 1975), this latter rule was adjudged an unconstitutional delegation of the licensing authority. We understand from counsel for the trainer in that case that the New York Attorney General has withdrawn his appeal from the decision and that the power to suspend is no longer being exercised by the stewards appointed by The Jockey Club and the racing association, but that the state appointed steward, acting alone, is continuing to exercise the power.

Summary of Argument

The District Court weighed the private interest of the Appellee against the broad interest of the State of New York and correctly concluded, on the basis of the facts in this case, that Section 8022 of the New York Unconsolidated Laws, which provides for summary suspension of a licensee pending a hearing, did not provide him with the meaningful review which due process requires, and was accordingly unconstitutional. We respectfully submit that, even if the scale had tipped on the side of the Appellants in the circumstances of this case, Section 8022 would still fail to satisfy the requirements of due process because of the overly broad sweep of its application.

Morrissey v. *Brewer,* 408 U.S. 471 (1972), calls for such procedural protections as the *particular situation demands.* This Court should reaffirm that doctrine by holding that a statute which provides for summary suspension of an occupational license pending a hearing and determination of disciplinary charges in any one of a variety of situations, denies the licensee due process. The Court has, we respectfully submit, already made it clear in *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), that the *particular* interest of the licensee which will be affected by the official action in a given type of situation must be weighed against those *particular* governmental interests which may be affected in the same type of situation. That test should be applied in this case.

ARGUMENT

I.

Section 8022, in providing a summary disciplinary procedure, precludes balancing the correct private and public interests in specific situations and accordingly fails to satisfy due process.

The relevant part of Section 8022 provides as follows:

> "If the state harness racing commission shall . . . revoke or suspend such a license granted by it, . . . the . . . licensee . . . may demand, within ten days after notice of the said act of the commission, a hearing before the commission . . . . Pending such hearing and final determination thereon, the action of the commission . . . in revoking or suspending a license . . . shall remain in full force and effect." McKinney 1961 & Supp. 1977-78.

Thus, Section 8022 provides for summary disciplinary action against a licensee while a hearing is pending. No authority is given the Commission (or the State Racing and Wagering Board now acting in its stead) to stay the revocation or suspension of a license before a hearing.

a. *The appropriate test for evaluating whether the safeguards of a procedure meet the requirements of due process in any given situation mandates that the* specific *and* particular *private interest of the licensee which will be affected by the official action must be weighed against those governmental interests which can reasonably be expected to be affected in that same situation.*

The District Court below found, and the Appellants do not challenge, that both the nature of a trainer's license in New York as well as New York's *ratio decidendi* in suspending it entitle the Appellee to due process protection.

With regard to the type of protection to which such a licensee is entitled, this Court has held that:

> "[D]ue process is flexible and calls for such procedural protections as the *particular situation demands.*" [Emphasis added.] *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972).

In the face of this requirement, the Appellants would ask this Court to uphold the constitutionality of a State statute which provides for *summary* punishment pending a hearing and, apparently, to permit the extension of such summary treatment to the many types of situations in which a licensee might be found to have breached a Rule of Racing. They would ask this Court to weigh the respective interests of the State of New York on the one hand, and all of its licensees as a group on the other hand, and to determine conclusively, as a matter of substantive law, that the interests of the State in the racing industry are always paramount. Henceforth, as we understand it, there would be no "weighing of interests" in the racing industry.

In support of this position, the Appellants cite the decisions of two United States Courts of Appeals to the effect that:

> "the state interest in regulating the racing industry outweighs the licensee's interest in obtaining a hearing prior to imposition of disciplinary action . . ." Appellant's Brief at 14.

The first case (in the order decided) is that of *Hubel* v. *West Virginia Racing Comm.*, 513 F. 2d 240 (4th Cir. 1975), a case in which the license of an owner and trainer of thoroughbred horses was suspended pending a hearing and determination. The second is *Ruane* v. *N.Y. State Racing & Wagering Board*, 460 F. Supp. 819 (1975), *affirmed per curiam*, 532 F. 2d 860 (2d Cir. 1976), a case involving the summary imposition of fines on eight jockeys who refused to ride on a turf course (as opposed to the dirt track) because they believed the turf course would be dangerous as a result of rainfall.[7]

Since these cases were argued, this Court has had occasion to re-examine, in a case involving whether an evidentiary hearing were required before the termination of disability benefits under the Social Security Act, which factors must be considered in evaluating whether an administrative procedure satisfies the dictates of due process. In *Mathews* v. *Eldridge*, it said:

> "Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the *governmental and private interests that are affected.* More

[7] The Guild was a party to the *Ruane* case, and The New York Racing Association Inc. entered an appearance in it.

> precisely, our prior decisions indicate that identification of the specific dictates of due process generally require consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 334-35 (emphasis added) (citations omitted).

The test enunciated in *Mathews* v. *Eldridge* has since been followed in *Ingraham* v. *Wright*, 430 U.S. 651, 682 (1977); *Mathews* v. *Williams*, 424 U.S. 951 (1976), *vacating Williams* v. *Weinberger*, 494 F.2d 1191 (5th Cir. 1974); *Mathews* v. *Mattern*, 425 U.S. 987 (1976), *vacating* 519 F.2d 150, 168-69 (3d Cir. 1975); *McGrath* v. *Weinberger*, 541 F.2d 249 (10th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977); *Lee* v. *Thornton*, 538 F.2d 27, 33 (2d Cir. 1976); *Kennedy* v. *Robb*, 547 F.2d 408, 414-15 (8th Cir. 1976), *cert. denied*, 431 U.S. 959 (1977); *Zurak* v. *Ryan*, 550 F.2d 86, 93 (2d Cir. 1977), *cert. denied*, 433 U.S. 914 (1978); *Basel* v. *Knebel*, 551 F.2d 395, 398 (D.C. Cir. 1977); *Ong* v. *Tovey*, 552 F.2d 305, 307 (9th Cir. 1977); *Drummon* v. *Fulton County Dept. of Family & Children's Services*, 563 F.2d 1200, 1210 (5th Cir. 1977); and *Montrym* v. *Panora*, 438 F. Supp. 1157 (D. Mass. 1977), distinguishing *Dixon* v. *Love*, 431 U.S. 105 (1977), which the Appellants stress.

As in the case of any true balancing test, its application produced varying results in the foregoing decisions; a

hearing was required in some of the cases and not in others. The important factor is that all of these cases, in reaching a decision as to the necessity of a hearing, employed the *Mathews* v. *Eldridge* test in order to fairly weigh the respective interests of the parties.

b. *The private interests which may be affected by official action in the racing industry include a wide variety of interests, such as that of the licensee's physical safety.*

Mathews v. *Eldridge* requires, first, identification of ". . . the private interest that *will be affected* by the official action." 424 U.S. at 335 (emphasis added). The official action involved in that case was the termination of the individual's disability benefits, as a result of an initial determination that he was no longer disabled. The "potential injury" from an erroneous deprivation, it was noted, did not extend to loss of the benefits themselves, as these would be paid retroactively. Therefore, the only "private interest" *affected* by the official action was "the uninterrupted receipt of this source of income." 424 U.S. at 340 (1976). The Court did not regard the "degree" or the "possible length" of this poential deprivation sufficient to be controlling. *Id.* at 341.

In the case presently before this Court, the official action was the suspension of a trainer's license as a result of an initial determination that his horse had received improper medication. This official action was designed (i) to punish alleged wrongdoing and (ii) to discourage others from wrongdoing. The "potential injury" from erroneously depriving him of his license was "a loss of clients and an irretrievable loss of income." 436 F. Supp. at 781. Thus the "private interest" *affected* by the official action was his "right to a livelihood". *Id.* The Court found that

the "degree" of the potential deprivation was "irreparable and substantial" and that its length was that of "any race meeting in progress." *Id.*

In each of these cases, care was taken to identify not only the official action, but the "potential injury" which the licensee would suffer from an erroneous deprivation of his benefits or license, as well as its degree and duration. This permitted identification of the specific private interest that had to be weighed against the government's interest.

These cases are to be contrasted with the *Hubel* and *Ruane* cases, *supra,* upon which the Appellants rely, but which preceded *Mathews* v. *Eldridge.* In the *Hubel* case, the official action consisted of the suspension of an owner-trainer's license as a result of an initial determination that his horse had been drugged. However, the court neither identified the "potential injury" to the licensee from an erroneous deprivation of his license, nor explored the degree or duration of that injury. The closest it came to identifying any interest of the licensee was his "normal and usual right to notice and hearing before disciplinary sanctions are applied . . ." 513 F.2d at 243 (1975). We submit that this is not an interest "affected" by an "erroneous deprivation" of his license and that the Court was simply using a one-sided scale.

In the *Ruane* case, the official action consisted of the levying of fines against eight jockeys as a result of initial determinations that the track was safe and that they had improperly refused to fulfill their riding engagements. They had refused to ride on the turf course, as opposed to the dirt course, because they "believed the turf track would be dangerous as a result of rainfall." 400 F. Supp. at 820.

The District Court said, in footnotes, that there was no coercion to ride, and seemed to regard the interest of the licensee to be balanced against the State's interest as, simply, "the risk of discipline". 400 F. Supp. at 821, nn. 3 and 4. It seems clear, however, that the "potential injury" resulting from an erroneous determination ran far beyond the mere accrual of interest on the fines, which could have been remitted. The official action in the *Ruane* case lay in two parts. The first part was the initial determination that the track was safe; the second was the determination, two days later when the fines were imposed, that they had improperly failed to fulfill their riding engagements. 400 F. Supp. at 820. At the time of the first, each jockey was given the opportunity to ride on the turf course or to risk punishment. His "potential injury" under the first alternative was his physical safety (as well as the heavy financial cost to him of any physical injury). The effect of the official action was either to persuade him to ignore that interest or to punish him for seeking to protect it, rightly or wrongly. We submit that it is the interest in his physical safety which, under *Mathews* v. *Eldridge,* must be weighed against the public interest.

c. *The public interests of preventing fraud, insuring public confidence and maintaining tax revenues are not always affected in these situations.*

Mathews v. *Eldridge* also requires *"analysis* of the governmental . . . interests that are *affected."* 424 U.S. at 334 (emphasis added). We respectfully submit that there is no room under this requirement for broad statements of public interest designed to justify Draconian justice.

In identifying which public interests were *affected* (of the various ones which might be involved) in *Mathews*

v. *Eldridge,* this Court looked directly at the "potential injury" which the public would suffer if that portion of the official action which was under constitutional challenge were different. In that case, it was the injury to the public which would result if every recipient of disability benefits were entitled, as a matter of constitutional right, to an evidentiary hearing prior to their termination. It thereupon identified the specific public interest which was *affected* as that of "conserving scarce fiscal and administrative resources". 424 U.S. at 348.

In the case presently before this Court, the District Court considered the injury to the public which would have resulted from conducting a prompt hearing. It found that there would have been little interference with track supervision. 436 F. Supp. at 781. It therefore concluded, in effect, that although tax revenues, preventing fraud and insuring public confidence were all legitimate interests of the State of New York, they were not interests *affected* by that portion of the official action which was under constitutional attack.

Once again, the *Hubel* and *Ruane* cases are clearly distinguishable, having been argued before *Mathews* v. *Eldridge.* In the *Hubel* case, the Court of Appeals for the Fourth Circuit identified the State's interests as those of protecting the "health of the horse" and "the purity of the sport", and discussed these interests at length. 513 F.2d at 243. However, there was no discussion of how these interests would have been *affected* if punishment had been postponed until after a hearing or if there had been a prompt hearing.

In the *Ruane* case, the District Court quoted the New York Court of Appeals to the effect that there was a "com-

pelling and substantial State interest in maintaining discipline among trainers and owners." *Tappis* v. *New York State Racing and Wagering Board,* 36 N.Y.2d 862, 864, 331 N.E.2d 697, 698, 370 N.Y.S.2d 922, 923 (1975). The District Court then concluded that "a similar interest applies to the question of discipline among jockeys." 400 F. Supp. at 822. It is difficult to see how transferring the race from the turf track to the dirt track, or the refusal of the jockeys to ride if the race were not transferred, could have resulted in possible fraud or loss of public confidence; the race program expressly contemplated such a transfer. There was apparently some dispute as to how promptly the jockeys voiced their concern to the stewards. 400 F. Supp. at 820. The State Racing and Wagering Board found that the "belated refusal . . . to ride . . . was calculated to cause turmoil and chaos".[8] 400 F. Supp. at 822. However, there was no finding that such turmoil and chaos did in fact result from the substitution of riders, nor substantial evidence that switching the race course would have in fact caused turmoil and chaos. We respectfully submit that the principal reason for disciplining the jockeys was, as the District Court found, to maintain "discipline among jockeys". We submit that this is far too vague a public interest to satisfy the test of *Mathews* v. *Eldridge.*

It is true that the mere threat of suspension deters both trainer and jockey from conduct which deviates from what the Rules of Racing require of him. The State has a substantial interest in this deterrent effect when it can be expected to deter fraud or prevent loss of public confi-

[8] There are always situations in which changes have to be made after betting on a race has begun. Examples are where a horse breaks out of the starting gate prematurely, exhausts itself and must be scratched, or where a jockey is unseated on the way to the post, injured and replaced.

dence. It would be an unusual situation, however, where the deterrent effect of the official action affected these public interests, but where the official action against the licensee himself did not. The public interest cannot be said to outweigh the private interest on the basis of this deterrent effect alone.

Furthermore, the State has conflicting interests in certain situations, such as when matters of safety are involved. On the one hand, it has a substantial interest in having the race run. On the other hand, we submit that it has the responsibility of minimizing the risk of physical injury or even death to the human participants. We submit that, under *Mathews* v. *Eldridge,* this interest must be weighed as well, even though it may have a "negative" effect on the governmental side of the scale.

The consequences of an erroneous determination do not necessarily stop with the licensee who, for example, refuses to fulfill his racing engagement. If the stewards seek out substitute riders and convince them to ride, as they did in the *Ruane* case, the consequences of an accident will fall upon these substitute riders. The evil of this situation is that the substitute riders may be less experienced, or financially more hard pressed, and thus more easily convinced that they should accept the risk.

We would be remiss not to point out that the predominant interest of the State of New York, and of other States, in racing is in the substantial revenue which the State derives as a "take-out" from the pari-mutuel handle.[9]

[9] We understand that the State of New York would have lost in excess of $100,000 in revenue if the race in the *Ruane* case had been cancelled. Transcript of Testimony in hearing on appeal by New York State Racing and Wagering Board, Dec. 17, 1974, p. 147.

The Appellants do not squarely face this underlying financial interest of the State. Its very magnitude in each race is not only the measure of the State's true interest, but also a measure of the pressure which the constitutional guarantee of due process must resist. Clearly, the State's financial interest cannot, of itself, outweigh the licensee's fundamental right to due process.

II.

Section 8022, in providing a summary disciplinary procedure, preempts analysis of the risks of an erroneous determination and, when appropriate, development of substitute procedural safeguards, and accordingly offends due process.

The danger of Section 8022, and of similar procedural statutes which might be enacted throughout the country to regulate the thoroughbred racing industry if the decision below were reversed, is the breadth of its sweep. Section 8022 does not distinguish between situations in which the risk of an erroneous deprivation is great from those where the risk is small. It discourages the development of substitute procedural safeguards where they are clearly needed. It conceals administrative reluctance to grant stays which imply an admission that the initial determinations might have been wrong. It discourages prompt hearings, which can be inconvenient to the members of the Board.[10]

[10] The Guild also maintains that the New York Administrative Procedure Act (McKinney Consol. L. 1977) applies to these proceedings. Section 401(1) of that Act merely provides that the adjudicatory procedures of the Act shall be followed in the *granting* of certain licenses and does not limit the applicability of those procedures in situations where a license has already been granted. Consequently, we maintain that Section 301 of the Act requires a hearing before the suspension of an occupational license in the racing industry. *Accord, In re Gerard* v. *Barry*, 59 App. Div. 2d 901, —— N.Y.S.2d —— (2d Dep't, 1977), *appeal dismissed*, N.Y.L.J. June 15, 1978 at 6, col. 2 (June 13, 1978). The exception in Section 401(3) which permits a summary suspension because the "public health, safety or welfare" requires emergency action clearly does not apply where the licensee's safety is involved.

a. The case before this Court is an example of the high risk of a possible erroneous determination.

In evaluating whether an administrative procedure satisfies the requirements of due process, *Mathews* v. *Eldridge* requires more than identification of the particular private interest which would be affected by an erroneous determination—that is, the "consequences" of error. It also requires an evaluation of the "risk" of an erroneous deprivation as a result of its use—that is, the "probability" of error. 424 U.S. at 335.

Mathews v. *Eldridge* involved a situation where the potential value of an evidentiary hearing, in addition to the medical reports, was limited. 424 U.S. at 344. Thus, the risk of an erroneous initial determination, and hence of an erroneous deprivation, was small.

At the other extreme is the case presently before this Court; the District Court concluded there was little more that the Appellee could have done to demonstrate a lack of culpability. 436 F. Supp. at 782. Therefore, the "probability" of error in the initial determination of culpability was considerable.

b. Substitute procedural safeguards are clearly necessary in some situations.

In the *Ruane* case, the risk of an erroneous determination, and hence deprivation, was compounded by the fact that it was necessary to determine initially whether or not the track was safe; this had to be done, not merely before

a formal hearing could be held, but in a matter of moments before the race was run. In situations such as this, the eventual hearing is not always meaningful because the existing pre-hearing procedures do not adequately provide for assembling and preserving objective evidence of the conditions which were the basis of the licensee's action.[11]

This is not the proper place to discuss the risk of an erroneous determination under the present procedures in the racing industry, or the probable value of additional or substitute procedures, in every possible situation in which disciplinary action may be taken against a licensee. The Guild would simply point out that there are situations, such as those where safety is involved, where the private interest of the licensee weighs heavily in his favor and where, no matter how quickly the initial determination must be made, an objection by the licensee is always timely. These situations call for special procedures. As this Court has said in *Mathews* v. *Eldridge*:

> "All that is necessary is that the procedures be tailored, . . . to 'the capacities and circumstances of those who are to be heard' . . . to insure that they are given a meaningful opportunity to present their case." 424 U.S. at 349, quoting *Goldberg* v. *Kelly*, 397 U.S. 254, 268-69 (1970) (footnote omitted).

We respectfully submit that the summary punishment authorized by Section 8022 pending a hearing discourages

[11] The motion for preliminary injunction in the *Ruane* case requested the District Court to prohibit "the stewards from disciplining jockeys who refuse to ride on grounds of hazardous conditions until the [New York Racing and Wagering] Board promulgates administrative procedures to protect the jockeys." 400 F. Supp. at 821.

the development of "meaningful" review and thus inhibits due process.

c. Stays have not in fact been granted, except possibly in very rare instances, and hearings have not in fact been held promptly.

We have noted the arguments of The New York Racing Association Inc. in its Brief *amicus curiae* (i) that the Board has interpreted Section 8022 as permitting it to grant stays and (ii) that prompt hearings are always offered. pp. 3 & 9. We are not in a position to admit or deny those statements, insofar as they pertain to the harness racing industry. However, we would certainly take issue with any inference to the effect that, in the thoroughbred racing industry in New York, stays are granted frequently or hearings are held promptly.[12] We respectfully submit that the constitutionality of Section 8022 should not be allowed to turn on such vague representations of procedural good faith by the State of New York as those advanced by The New York Racing Association Inc. as *amicus curiae*, particularly when the Appellants themselves do not advance these arguments in this Court and in fact present their question to this Court in a form which deeply concerns the Guild about their true intentions.

[12] In the *Ruane* case, a hearing by the Board was requested on November 5, 1974, after informal negotiations for the remission of the fines had failed. The hearing was commenced on December 17, 1974 and continued on January 7, 1975. On February 20, 1975, four days before winter racing in New York was to begin without a decision by the Board, the proceeding in the federal District Court was commenced. The Board and District Court handed down their decisions on March 17 and August 28, 1975, respectively.

The Guild respectfully submits that the constraints which procedural due process impose on governmental decisions do not leave room for broad exceptions, such as one which would cover all of the situations which might arise in an entire industry. This Court should continue to require that the administrative procedures in any given area of governmental activity meet the very sensible standards of *Mathews* v. *Eldridge*.

The Guild believes that Section 8022 of the Unconsolidated Laws of the State of New York, by providing for the summary suspension of occupational licenses in the harness racing industry pending a hearing and determination of the charges, patently fails to qualify under that test. Accordingly, it believes that the District Court below properly applied the law and reached the correct result in holding Section 8022 unconstitutional.

CONCLUSION

For the reasons stated above, the decision of the District Court should be affirmed.

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Respectfully submitted,

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